was "synonymous" with Kentucky's "present physical injury requirement." Reply Br. at 16. Accordingly, petitioners framed the question presented for review as whether their showing of asymptomatic subcellular damage from radiation exposure was "insufficient as a matter of law to establish a bodily/physical injury or disease under Kentucky Law." Appellants' Br. at 2.

The Sixth Circuit affirmed the District Court's determination that petitioners' claims were governed by the Price-Anderson Act, but that Kentucky law would provide the "substantive foundations" for those claims. App. 19a. It further affirmed the District Court's holding that the Kentucky Supreme Court's decisions in *Wood* and *Capital Holding* compelled the grant of summary judgment based on petitioners' "lack of any present physical illness." App. 19a–28a.

B. The *Bivens* Claim

The District Court dismissed petitioners' *Bivens* claim relying on this Court's decision in *Malesko*, 534 U.S. at 66, which held that a *Bivens* action may not be maintained against a private corporation. App. 79a–80a. The Sixth Circuit affirmed the dismissal, but on different grounds. Relying on *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), and *Bush* v. *Lucas*, 462 U.S. 367 (1983), it held that the comprehensive statutory framework established in the Price-Anderson Act for claims arising out of a "nuclear incident" foreclosed any remedy under *Bivens*. App. 29a–33a.[5]

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[5] Following the initial dismissal of their *Bivens* claim, petitioners sought to amend their complaint to assert an "equitable" constitutional claim for unjust enrichment and disgorgement of profits. The District Court denied this motion, holding that "[t]he 'equitable' claim is just a disguised version of [petitioners'] money damages claim and it should be foreclosed for the same reasons set out in *Malesko*." App. 69a. In the light of its disposition of the *Bivens* claims, the Sixth Circuit held that the request for equitable relief was moot. App. 33a.

REASONS FOR DENYING THE WRIT

Petitioners have asserted that eight different questions are presented in this case. Questions 1 through 4 of the Petition, and Parts I to III of the Reasons for Granting the Petition, relate to the grant of summary judgment on petitioners' tort claims under the Price-Anderson Act.

We respond to these arguments in Parts I and II below. In Part I, we show that review by this Court would be inappropriate because the Sixth Circuit affirmed the grant of summary judgment based on its interpretation of Kentucky law, and none of the parties has contended that Kentucky law is inconsistent with the Price-Anderson Act. Consequently, these issues do not present any question of federal law. In Part II, we show that the Sixth Circuit's decision does not conflict with any of the various decisions of this Court and the federal courts of appeals cited in the Petition.

Question 5 of the Petition and Part IV of the Reasons for Granting the Petition relate to the dismissal of petitioners' *Bivens* claim. We respond to these arguments in Part III below. We show that the Sixth Circuit's decision was based on a straightforward application of the principles set forth by this Court in *Schweiker* and *Bush*, which held that a *Bivens* remedy should not be implied where Congress has provided what it considers to be an adequate alternative remedy. The Sixth Circuit decision does not conflict with any decision of this Court or any federal court of appeals, and in any case, as the District Court correctly held, this Court's decision in *Malesko* forecloses any *Bivens* remedy against private corporations like GE.

The remaining questions and issues presented in the Petition relate only to the Paducah contractors and thus are not addressed in this brief.

I. Review of the Sixth Circuit's Decision With Respect to the Price-Anderson Claims Is Unwarranted Because the Decision Was Based on an Interpretation of Kentucky Law.

The Sixth Circuit agreed with the District Court that although petitioners' state law tort claims were governed by the Price-Anderson Act, Kentucky law would provide the substantive rules of decision for those claims.[6] *See* 42 U.S.C. § 2014(hh). Petitioners did not argue in the Sixth Circuit that the Price-Anderson Act imposed different requirements from Kentucky law. To the contrary, they conceded that the Act contained a "bodily injury or disease requirement" that was "synonymous" with Kentucky's "present physical injury requirement." Reply Br. at 16. Petitioners' sole argument concerning the Price-Anderson claims before the Sixth Circuit was that the claims were viable under Kentucky law. Appellants' Br. at 33. Therefore, the Sixth Circuit properly looked to Kentucky law to determine whether petitioners could withstand summary judgment on these claims.

Because the Sixth Circuit's decision turned on the interpretation of Kentucky law, review by this Court is unwarranted.

A. The Sixth Circuit Decided the Case Based on Kentucky Law.

The Sixth Circuit made it clear that it was deciding the Price-Anderson claims based on Kentucky law. It stated:

> "The key question before us . . . is whether Kentucky caselaw equates 'subcellular damage' with 'bodily injury.' The issue has been previously addressed by the Kentucky courts, but, as the plain-

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[6] *See* App. 20a ("Courts are required to look to state law for the substantive rules to apply in deciding claims brought under the Act.")

> tiffs note, the underlying facts have been slightly different. We must therefore make the 'best prediction, even in the absence of direct state court precedent, of what the Kentucky Supreme Court would do if it were confronted with this question.'" App. 20a. (citation omitted)

It then proceeded to examine the Kentucky Supreme Court's decisions in *Wood* and *Capital Holding*, App 20a–23a, decisions from lower courts in Kentucky, App. 23a–24a, cases from other jurisdictions, App. 25a–26a, and public policy considerations, including those considerations to which Kentucky courts had previously given weight. App. 26a–28a. After considering these sources, the Sixth Circuit concluded:

> "Kentucky caselaw provides sufficient guidance for us to conclude that, if this case were to be decided in that state's courts, the public policy considerations and lack of any present physical illness would require the grant of summary judgment in favor of the defendants." App. 28a.

Thus, the court's decision was based on an interpretation of Kentucky law as enunciated by the Kentucky Supreme Court and lower Kentucky courts.

Petitioners fault the Sixth Circuit (at 11) for citing public policy considerations as one of the factors in its decision process. Petitioners cite nothing to suggest that this was inappropriate, and in any event the opinion makes it clear that the Sixth Circuit was relying on these considerations simply as an aid to its construction of Kentucky law, which the court deemed dispositive. Moreover, the policy considerations that the Sixth Circuit cited were essentially the same policy considerations that the Kentucky Supreme Court relied on in *Wood* and *Capital Holding*. *See* App. 22a–23a.

Petitioners also contend (at 10, 14) that the Sixth Circuit's opinion conflicts with Kentucky precedent.[7] GE submits that the Sixth Circuit's conclusion was plainly correct under the governing Kentucky precedents of *Wood* and *Capital Holding*. But even if the Sixth Circuit had erred in its construction of Kentucky law—which it did not—that would not present a proper question for review by this Court. The Kentucky Supreme Court, not this Court, is the final arbiter of Kentucky law.

B. Petitioners' New Argument Concerning the Price-Anderson Act Does Not Warrant Review.

Petitioners now argue for the first time in this Court (at 12) that under the Price-Anderson Act, "irradiation" is a compensable injury, even in the absence of any manifestation of disease symptoms. To the extent that petitioners now contend that the Price-Anderson Act imposes different requirements from Kentucky law, this new argument should not be considered. As noted above, before the Sixth Circuit, petitioners conceded that the requirements of the Price-Anderson Act were "synonymous" with the requirements of Kentucky law. Having made that concession, and argued their case solely with reference to Kentucky law, petitioners should not now be permitted to argue in this Court that Kentucky law (as interpreted by the Sixth Circuit) somehow conflicts with the Price-Anderson Act.

In any event, whether the Price-Anderson Act permits a plaintiff to recover personal injury damages based solely on "irradiation" is not a question that merits review by this Court. To our knowledge, only one federal

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[7] The only Kentucky decision that petitioners cite (at 13) is *Deutsch* v. *Shein*, 597 S.W.2d 141 (Ky. 1980), which they assert (at 13) stands for the proposition that "irradiation" can support a cause of action for personal injury. The Kentucky Supreme Court expressly rejected this reading of *Deutsch* in both *Wood*, 82 S.W.3d at 853, and *Capital Holding*, 873 S.W.2d at 193.

court of appeals has addressed this question—the Ninth Circuit in *Berg*—and that decision squarely rejected the notion that exposure to radiation gives rise to a cause of action under the Price-Anderson Act. Instead, the Ninth Circuit held in that case that permitting plaintiffs to recover damages without showing a "physical injury" would be inconsistent with the requirements of the Act. 293 F.3d at 1131-33. Since *Berg* is the only reported case to address this issue, there obviously is no conflict among the circuits, and hence no basis for review by this Court.

II. The Sixth Circuit's Decision With Respect to the Price-Anderson Claims Does Not Conflict With Any Decision of This Court or Any Federal Court of Appeals.

As we have shown, the Sixth Circuit concluded that under Kentucky law, subcellular changes would not constitute a "bodily injury" sufficient to give rise to a cause of action for negligence or strict liability. App. 20a–28a. Petitioners contend that this holding conflicts with various decisions from this Court and other federal courts of appeals. There is no merit to these arguments.

A. The Sixth Circuit's Decision Does Not Conflict With This Court's Decisions in *Silkwood* and *Ayers*.

Petitioners argue (at 10–15) that the Sixth Circuit's decision conflicts with this Court's decisions in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *Norfolk & Western Railway Co.* v. *Ayers*, 538 U.S. 135 (2003). Notably, petitioners did not cite *Silkwood* or *Ayers* in the District Court or in their Sixth Circuit briefs or rehearing petition. Accordingly, petitioners' arguments concerning these cases should not even be considered by this Court. In any case, the decision does not conflict with *Silkwood* or *Ayers*.

1. *Silkwood* was decided before the enactment of the Price-Anderson Amendments Act of 1988, 102 Stat.

1066. At that time, the federal courts did not have jurisdiction over claims arising out of or resulting from "nuclear incidents."[8] In *Silkwood*, the decedent was exposed to plutonium in her workplace, and as a result of this exposure her home was also contaminated. 464 U.S. at 241–42. She later died in an unrelated car accident, and her estate sued for damages for personal injury and property damage under Oklahoma law.

The issue before this Court in *Silkwood* was whether federal law precluded the plaintiff from recovering punitive damages on her property damage claim. This Court, analyzing the Price-Anderson Act as it then existed, determined that an award of punitive damages was not preempted. It held that "in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." *Id.* at 256.

In the light of the 1988 amendments, the precise holding of *Silkwood* is no longer good law. The 1988 amendments gave federal courts jurisdiction over "public liability actions"—*i.e.*, claims arising out of or resulting from "nuclear incidents"—and barred any award of punitive damages in such cases where the defendant is indemnified by the United States. *See* 42 U.S.C. § 2014(q), (w), (hh); *id.* § 2210(n)(2), (s).

Petitioners argue (at 11) that *Silkwood* and the 1988 amendments reflect a policy that "state law remedies be available to those injured by nuclear incidents." GE agrees that under the 1988 amendments, state law continues to provide the substantive rules for decision for claims arising out of nuclear incidents, unless such

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[8] Prior to the 1988 amendments, federal court jurisdiction under the Price-Anderson Act was limited to claims arising out of or resulting from a much more narrow category of "extraordinary nuclear occurrences." *See, e.g., Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000); *Kiick v. Metro. Edison Co.*, 784 F.2d 490, 494 (3d Cir. 1986) (quoting pre-1988 version of § 2210(n)(2))

law is inconsistent with the Price-Anderson Act. *See* 42 U.S.C. § 2014(hh). But this argument does not help petitioners, because—as noted above—the Sixth Circuit decided this case based its interpretation of Kentucky law. Thus, petitioners were not deprived of a remedy they would have had under state law.

Petitioners also argue (at 13) that *Silkwood* stands for the proposition that "irradiation" is "sufficient to support an action for personal injury absent clinically manifest disease." *Silkwood* does not support this proposition at all. Although the plaintiff had originally asserted both property damage and personal injury claims, the Tenth Circuit held that the personal injury claim was barred by the Oklahoma worker's compensation statute. 464 U.S. at 246. Consequently, the only claim before this Court was a claim for *property damage*, not personal injury.

And in any event, *Silkwood* was decided under Oklahoma law—not Kentucky law. Even assuming that the Oklahoma courts would recognize an action for "irradiation" in the absence of any disease manifestation, that would not mean that the Sixth Circuit erred in finding, based on *Wood* and *Capital Holding*, that the Kentucky courts would not recognize such an action. In short, to the extent that *Silkwood* remains good law, it does not conflict with the Sixth Circuit's ruling in this case.

2. In *Ayers*, this Court held that a plaintiff suffering from the disease of asbestosis may recover damages for fear of cancer under the Federal Employers' Liability Act ("FELA"). 538 U.S. at 141. Petitioners appear to be relying on *Ayers* to suggest that they should also be entitled to recover damages for fear of cancer.

Ayers is distinguishable for two reasons. First, in *Ayers*, the substantive rules for decision were a matter of federal law under FELA. By contrast, as we have shown, the Price-Anderson Act provides that the substantive rules of decision are to be provided by state

law, 42 U.S.C. § 2014(hh), and the Sixth Circuit decided the case based on Kentucky law. Even if FELA did permit a plaintiff to recover fear of damages absent any symptoms of disease (which, as discussed below, it does not), that would not mean that the Sixth Circuit erred in its interpretation of Kentucky law.

Second, in *Ayers*, it was undisputed that the plaintiffs were suffering from asbestosis, which the Court characterized as a "clinically serious, often disabling, and progressive disease." 538 U.S. at 148; *see also id.* at 142 n.2 (listing symptoms of asbestosis). By contrast, petitioners here do not exhibit any symptoms of any disease; they merely contend that they are at increased risk of developing cancer some time in the future. Nothing in *Ayers* suggests that an increased risk of disease, without any symptoms, gives rise to a cause of action under FELA. To the contrary, this Court expressly rejected that argument in *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424 (1997), holding that under FELA, a "worker negligently exposed to a carcinogen . . . cannot recover unless, and until, he manifests symptoms of a disease." *Id.* at 426–27.

Accordingly, *Ayers* does not support petitioners' contention that they are entitled to recover damages for fear of cancer even though they do not currently manifest any symptoms of disease.

B. The Sixth Circuit's Decision Does Not Conflict With Any Decision of Any Other Court of Appeals.

Petitioners also assert (at 13–14, 19–22) that the Sixth Circuit's decision conflicts with various other decisions of federal appellate courts.[9] These arguments also lack any merit.

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[9] Petitioners also cite several district court decisions and a few decisions from state courts. While GE believes that petitioners have mischaracterized many of these cases, we will not address them in

1. Petitioners (at 19) cite *Lead Industries Ass'n, Inc.* v. *EPA*, 647 F.2d 1130, 1158 (D.C. Cir. 1980), for the proposition that the "modern trend" in preventive medicine is to detect and correct health problems at their subclinical stages.[10] *Lead Industries*, however, was not a tort case, but an industry petition for review of air quality standards issued by the Environmental Protection Agency. *Lead Industries* thus has nothing to say about whether subclinical changes that have not resulted in disease symptoms are sufficient to give rise to a cause of action in tort under any state's law—much less under Kentucky law.

2. Petitioners also (at 19–21) cite several cases (some unpublished and non-precedential) involving the construction of the term "bodily injury" in liability insurance policies.[11] Petitioners did not cite any of these decisions in the District Court or the Sixth Circuit. Furthermore, none of these cases involves the application of Kentucky law. But in any event, courts have recognized a "clear distinction" between the time when "bodily injury" occurs for purposes of triggering coverage under an insurance policy and the time when such injury becomes compensable for purpose of tort law, *i.e.*, when a cause of action accrues. *Ins. Co. of N. Am.* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1223

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detail because (1) the cases do not involve the application of Kentucky law, and (2) conflict between a court of appeals decision and a district court decision is not generally a ground for Supreme Court review in any event. *See* Sup. Ct. R. 10. We also note that several of these cases were not cited in either the District Court or the Sixth Circuit.

[10] Petitioners mistakenly describe *Lead Industries* as a Second Circuit decision.

[11] *See VoiceStream Wireless Corp.* v. *Fed. Ins. Co.*, 112 Fed. Appx. 553 (9th Cir. 2004); *N. Ins. Co. of N.Y.* v. *Baltimore Bus. Comm., Inc.*, 68 Fed. Appx. 414 (4th Cir. 2003); *Campbell* v. *Metro. Prop. & Cas. Ins. Co.*, 239 F.3d 179 (2d Cir. 2001); *Am. Home Prods. Corp.* v. *Liberty Mut. Ins. Corp.*, 748 F.2d 760 (2d Cir. 1984); other cases cited in Petition (at 20).

(6th Cir. 1980).[12] Thus the construction of insurance policies is not relevant to the issues in this case.

3. Finally, petitioners argue (at 21) that the Sixth Circuit's decision is inconsistent with *Hagerty* v. *L&L Marine Services, Inc.*, 788 F.2d 315 (5th Cir.), *reh'g denied*, 797 F.2d 256 (5th Cir. 1986). Petitioners failed to cite *Hagerty* in either the District Court or the Sixth Circuit. In any event, *Hagerty* does not involve any interpretation of Kentucky law. Furthermore, it does not hold (as petitioners claim) that "cellular and chromosomal damage [is] sufficient to support liability for emotional injury."

The plaintiff in *Hagerty* was a seaman who was accidentally soaked with toxic chemicals, as a result of which he developed "[d]izziness, leg cramps, and a persistent stinging sensation in [his] feet or fingers." 788 F.2d at 317. Thus, unlike petitioners in this case, he *did* manifest some symptoms of disease or illness. The Fifth Circuit held that this was sufficient injury to permit him to assert a cause of action in tort under the Jones Act. *Id.*[13] Consequently, *Hagerty* does not stand for the proposition that a plaintiff may recover tort damages under federal law absent any symptoms of illness or disease. In any case, as noted above, this Court's subsequent decision in *Metro-North* made it clear that a plaintiff cannot recover tort damages under

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[12] *See also Keene Corp.* v. *Ins. Co. of N. Am.*, 667 F.2d 1034, 1043 n.17 (D.C. Cir. 1981) (because different policy considerations apply, cases regarding accrual of a claim for statute of limitations purposes are "not at all relevant" to construction of insurance policies).

[13] Although *Hagerty* did appear to suggest that a plaintiff could recover damages for fear of cancer absent a physical injury, the Fifth Circuit clarified on rehearing that it had "assumed an actionable injury and . . . intended no opinion as to the nature of the injury required to give rise to an actionable claim." 797 F.2d at 256.

federal law unless and until disease symptoms become manifest. 521 U.S. at 426–27.[14]

III. Review of the Sixth Circuit's Decision With Respect to the *Bivens* Claim Is Unwarranted, Because It Does Not Conflict With Any Decision of This Court or a Federal Court of Appeals.

The Sixth Circuit held that the comprehensive remedial scheme set forth in the Price-Anderson Act for claims arising out of a "nuclear incident" precluded petitioners from asserting a *Bivens* claim. It based this conclusion primarily on *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), and *Bush* v. *Lucas*, 462 U.S. 367 (1983).

In both of these decisions, this Court declined to imply a damages remedy under *Bivens* where Congress had established an alternative statutory remedial scheme. In *Bush*, the Court held that the existence of "comprehensive procedural and substantive provisions giving meaningful remedies against the United States" precluded a federal civil servant from asserting a *Bivens* claim against his supervisor for alleged violations of his First Amendment rights. 462 U.S. at 368. In *Schweiker*, the Court held that the Social Security Act foreclosed a *Bivens* remedy for improper denial of Social Security benefits. 487 U.S. at 424–29. The Court explained that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Id.* at 423.

The Sixth Circuit's decision rests on a straightforward application of the principles set forth in *Schweiker* and *Bush*. After examining the legislative history of the Price-Anderson Act, the court concluded

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[14] Jones Act cases follow cases under FELA. *E.g.*, *Brown* v. *Parker Drilling Offshore Corp.*, 410 F.3d 166, 178 (5th Cir. 2005).

that "Congress indisputably intended for the Act to be the primary remedial mechanism for claims arising out of 'nuclear incidents.' " App. 31a. Because Congress had provided what it considered to be an adequate remedial mechanism, the Sixth Circuit found no basis for implying an additional *Bivens* remedy. App. 33a.

Petitioners argue (at 24) that under *Carlson* v. *Green*, 446 U.S. 14 (1980), a *Bivens* claim is only precluded if Congress "explicitly" declares an alternative remedy to be a substitute for direct recovery under the Constitution and viewed as equally effective. In neither *Bush* nor *Schweiker*, however, did the statutory scheme contain any such "explicit" statement.[15] The Sixth Circuit's decision is thus consistent with the governing precedent from this Court.

Petitioners do not argue that the Sixth Circuit's ruling conflicts with any decision of any other court of appeals. Indeed, to our knowledge, no other court has ever addressed whether the Price-Anderson Act remedy precludes a *Bivens* claim. Thus there is no conflict among the circuits that might justify review of this question.

But in any event, even assuming that the Sixth Circuit erred in holding that the Price-Anderson Act precludes a *Bivens* remedy, this Court's decision in *Malesko* would still prevent plaintiffs from asserting a *Bivens* claim. In *Malesko*, this Court unequivocally held that the *Bivens* remedy could not be extended "to confer a right of action for damages against private entities acting under color of federal law." 534 U.S. at 66. Thus, as the District Court recognized, App. 79a, petitioners cannot assert a *Bivens* action against GE or

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[15] *See Bush*, 462 U.S. at 372–73 (noting that "Congress has not expressly precluded the creation of [a *Bivens*] remedy by declaring that existing statutes provide the exclusive mode of redress" and assuming that civil service remedy would not be as effective as individual damages remedy); *Schweiker*, 487 U.S. at 425 (finding case indistinguishable from *Bush*).

the Paducah contractors, all of which are private corporations.

For all of these reasons, review by this Court of the dismissal of the *Bivens* claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 29, 2005

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Section 11 of the Atomic Energy Act of 1954, as amended by the Price-Anderson Act, 71 Stat. 576, and as subsequently amended, 42 U.S.C. § 2014, provides in relevant part:

> "Sec. 11. DEFINITIONS.—The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this Act:
>
> • • •
>
> "e. The term 'byproduct material' means (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.
>
> • • •
>
> "q. The term 'nuclear incident' means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material . . . .
>
> • • •
>
> "w. The term 'public liability' means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of

responding to a nuclear incident or a precautionary evacuation) . . . .

* * *

"z. The term 'source material' means (1) uranium, thorium, or any other material which is determined by the [Atomic Energy] Commission pursuant to the provisions of section 61 [42 U.S.C. § 2091] to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

"aa. The term 'special nuclear material' means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 51 [42 U.S.C. § 2071], determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

* * *

"hh The term 'public liability action', as used in section 170 [42 U.S.C. § 2210], means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 170 [42 U.S.C. § 2210], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section."

2. Section 170(n)(2) of the Atomic Energy Act of 1954, as added by the Price-Anderson Act and as subsequently amended, 42 U.S.C. § 2210(n)(2), provides in relevant part:

"(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district

where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court . . . or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of title 28, United States Code . . . ."

3. Section 170(s) of the Atomic Energy Act of 1954, as added by the Price-Anderson Act and as subsequently amended, 42 U.S.C. § 2210(s), provides:

"s. LIMITATION ON PUNITIVE DAMAGES.—No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation."

No. 05-265

IN THE

Supreme Court of the United States

ALPHONSE RAINER, *et al.*,

Petitioners,

v.

UNION CARBIDE CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Are allegations of "subcellular changes" which cause no physical symptoms and which may or may not later develop into a "clinically relevant disease" sufficient to establish a present physical injury under either the *Price-Anderson Act* or the applicable Kentucky law?

2. Absent evidence demonstrating a defendant/employer's "deliberate intention to produce injury or death", are physical injury suits by employees, such as the claims advanced by Petitioners herein, barred by the Kentucky Workers' Compensation Law?

3. Are Petitioners' federal constitutional claims against the Respondent contractors cognizable under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* and its progeny?

4. Did the District Court error in finding that an inadvertently produced document was protected from disclosure by the attorney-client privilege?

PARTIES TO PROCEEDING

The parties to this proceeding are as follows:

Petitioners:	Alphonse Rainer David M. Sacharanoski Harold Hargan Charles A. Ramsey Mrs. H. C. (Sylvia) Mathis Mrs. Alphonse (Janie) Rainer Sybil Mathis Shanda M. Mathis Chyanne Rainer Stevens
Respondents:	Union Carbide Corporation Martin Marietta Corporation Martin Marietta Energy Systems, Inc. Martin Marietta Utility Services, Inc. Lockheed Martin Corporation Lockheed Martin Energy Systems, Inc. Lockheed Martin Utility Services, Inc. General Electric Company

Union Carbide Corporation is a wholly-owned subsidiary of The Dow Chemical Company. The Dow Chemical Company has no parent. Martin Marietta Corporation is now known as Lockheed Martin Corporation. Martin Marietta Energy Systems, Inc. is now known as Lockheed Martin Energy Systems, Inc. Martin Marietta Utility Services, Inc. is now known as Lockheed Martin Utility Services, Inc. Both Lockheed Martin Energy Systems, Inc. and Lockheed Martin Utility Services, Inc. are wholly-owned subsidiaries of Lockheed Martin Corporation. U.S. Trust Company

(16.16%), and State Street Bank and Trust Company (19.26%), as fiduciaries, currently hold more than a 10% ownership interest in Lockheed Martin Corporation. Lockheed Martin Corporation has no parent.

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STATEMENT OF THE CASE

Petitioners, past and present workers at the U.S. Department of Energy ("DOE") owned Paducah Gaseous Diffusion Plant ("PGDP") and members of their households, allege that they were exposed to excessive radiation from that facility. They filed this putative class action against these Respondents[1], corporations that operated PGDP at various times under contracts with the federal government, asserting various tort claims for damages. Petitioners later filed a second class action Complaint (on behalf of, and against the same parties) to assert a federal *Bivens* claim. The District Court granted all or part of a series of motions for summary judgment, which cumulatively dismissed all claims against all Respondents. Those decisions were upheld by the Sixth Circuit Court of Appeals, *Rainer v. Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005), and Petitioners subsequent application for rehearing *en banc* was denied by that Court.

STATEMENT OF FACTS

The Paducah Gaseous Diffusion Plant ("PGDP") is one of two existing federally-owned uranium enrichment facilities in the United States. Production began at PGDP in 1952 after President Truman directed the federal government to expand the nation's capacity to produce fissionable material used in nuclear weapons. Contrary to Petitioners' assertions,[2] the Paducah plant was designed and directed by the Atomic Energy Commission and its successor agencies to process *both* natural uranium and recycled uranium (primarily "reactor returns") from other facilities within the U.S. nuclear complex.

1. The Petitioner Plaintiffs also sued several entities that supplied materials to the PDGP, including Respondent General Electric Company.

2. *See Petition for Writ of Certiorari* ("*Petition*") at p. 2.

At all relevant times, PGDP was operated by three successive corporations (all joined as Respondents herein) under contracts with the federal government.[3] Union Carbide Corporation ("Union Carbide") operated the facility from the outset in 1952 until April 1, 1984; Lockheed Martin Energy Systems, Inc. ("LMES") conducted the operations from April 1, 1984, until June 30, 1993, and performed environmental remediation activities at the site until April 1, 1998; and Lockheed Martin Utility Services, Inc. ("LMUS") conducted uranium enrichment operations at PGDP between July 1, 1993 and May 17, 1999. All such operations were performed pursuant to contracts with the United States government[4] or, in the case of LMUS, with the United States Enrichment Corporation ("USEC"), then a government corporation formed by the *National Energy Policy Act of 1992.*

This case was initiated as a purported class action by current and former PDGP employees[5] who asserted that they had been exposed to excessive levels of radiation in the course of their employment. Although the *Petition* filed herein contains the same exaggerated and misleading recitation of "facts" that characterized the Plaintiffs' various memoranda below, the facts relevant to the rulings that they seek to be reviewed are uncontroverted by the evidence of record.

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3. Contrary to Petitioners' statement, the facility was never "leased" by Respondents.

4. The Department of Energy or its predecessor agencies.

5. Although the *Amended Complaint* identifies four putative classes, the distinctions between the asserted classes are not relevant to this Court's consideration of the Appellants' *Petition*.

First, it is undisputed that ***the only "physical injury" claimed by Petitioners in this action consists of purported subcellular changes***, found after highly technical expert analysis, which are completely symptomless, and are part of a natural biologic process by which the body responds to exposures to radiation, including natural radiation from the sun and earth. ***Petitioners do not and cannot claim that they currently suffer from radiation-induced illnesses or diseases, or even that they likely will suffer such harm in the future.*** The most they can say is that the allegedly damaged chromosomes "*may* well appear *years later* as a recognized *clinically relevant* illness" (Raff Affidavit, Jt. App. 1336; emphasis added).

It is also undisputed that **the majority of Petitioners' claims**, at least against these Respondents, **are asserted against the entities who were their *employers* at the time of the alleged radiation exposures**. Both the District Court and the Court of Appeals found those claims to be subject to, and barred by the "exclusive remedy" provisions of the Kentucky workers' compensation law, since Petitioners did not as much as allege that Respondents "deliberately intended" them harm. Petitioners continue to challenge this application of the Kentucky law, but their failure to present evidence of a "deliberate intent to harm" is not at issue.

Finally, there is no question that ***each of the Respondents herein is a private corporation***, and/or that Petitioners' federal constitutional cause of action is based solely on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and its progeny. This Court has specifically held that such claims are *not* cognizable against corporate defendants, *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001).